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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-131

HARRY BENSON,

Petitioner,

v.

SAMBO'S RESTAURANTS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH J. HAFERKAMP
Cavalletto, Webster, Mullen
& McCaughey
112 E. Victoria Street
Santa Barbara, CA. 93101
(805) 966-1501

Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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STATEMENT OF THE CASE

In general, the statement of the facts set forth in the Petition is accurate. However, Respondent does disagree with the statement in several particulars.

First, Respondent disagrees with the broad statement in the first paragraph on page 7 of the Petition that "Benson and Wagner orally agreed to terms, ..." As the California Court of Appeal pointed out on page 6 of its Opinion, the July 28, 1970 conversation dealt solely with the rent return to the landlord. The result

of the conversation is set forth in the letter (as amended in handwriting) on page 7 of the Opinion. As the California Court of Appeal stated, neither the writing of August 12, 1970 nor the letter of March 21, 1970 contained the legal requirements for an agreement to make a lease. Consequently, it is incorrect to say that Benson and Wagner "orally agreed to terms" if the implication is that an adequate oral agreement had been made.

Secondly, and more importantly, Petitioner's statement egregiously omits to note that the California Court of Appeal based its decision upon two equal and independent grounds. As the Court pointed out on page 22 of its Opinion, "the record simply cannot support the conclusion that a binding agreement existed. Even putting aside the problem of Wagner's authority to bind Sambo's, the remaining problems . . . make it clear that Benson and Wagner never reached agreements on essential details of the proposed lease." Thus, the Court of Appeal clearly set forth as the principal reason for its decision that the evidence established that there was no meeting of minds even as between Wagner and Benson sufficient to form a legally enforceable contract without regard to the question of Wagner's authority.

Finally, the Petitioner's statement of the case neglects to mention the other contentions made by Respondent in the Court of Appeal which were not passed upon by either the Court of Appeal o. the California Supreme Court in ordering judgment for Sambo's Restaurants, Inc. Those contentions are set forth on pages 21 and 22 of the Opinion and certainly contentions (2) and (3) would in themselves justify the judgment of the California Court of Appeal.

ARGUMENT

I.

THE DECISION IS CORRECT ON AN INDEPENDENT GROUND.

As noted previously, the California Court of Appeal placed its decision on two grounds. The first ground that, viewing the evidence most favorably to Petitioner, the facts did not establish a contract is a basic question of law clearly within the competence and jurisdiction of the California Courts. "The question as to whether, from the facts found, there was a contract . . . or any other legally enforceable obligation, is a question of law and not of fact." *Hunter v. Sparling*, 87 Cal. App. 2d 711, 721 (1948). The Court of Appeal thoroughly reviewed the entire record and found that the substantial evidence was not sufficient to establish a legally enforceable agreement between Petitioner and Mr. Wagner, let alone Sambo's Restaurants, Inc. Since Sambo's Restaurants, Inc. was the only Defendant, that ruling establishes that even if Wagner had authority sufficient to bind Sambo's Restaurants, Inc., Wagner never did make a legally enforceable contract.

Petitioner is not correct in his position concerning Wagner's authority. However, even if he were correct on that score, that would not justify certiorari because Petitioner has no legally enforceable right against Respondent and therefore could not prevail under California law even if his position in this Petition were accepted.

II.

PETITIONER FAILED TO RAISE ANY FEDERAL QUESTION BELOW.

A federal question which was not presented in the Courts below when Petitioner had an opportunity to do so does not justify certiorari in this Court. *Beck v. Washington*, 369 U.S. 541, 553 (1962); *Capitol City Dairy Co. v. Ohio*, 183 U.S. 238, 248, (1902). Petitioner admits that the federal question raised in the Petition had not been raised prior to the filing of his Petition in this Court.

The gist of Petitioner's position apparently is that the California Court of Appeal erroneously held that Sambo's could rely upon § 2309 of the California Civil Code, the so-called "Equal Dignities Rule." However, Sambo's has consistently contended since the suit was commenced that Petitioner could not recover because, among other things, § 2309 applied. Consequently, if Petitioner wished to contend that failure to estop Sambo's would constitute a deprivation of due process of law under the Constitution of the United States he certainly should have raised that contention, at the very latest, in his Brief before the Court of Appeal. He did not do so.

Furthermore, Petitioner certainly should have raised that contention in his Petition for Re-hearing in the Court of Appeal (Petition, page 9), but he did not do so. Finally, even if Petitioner's contention that "the denial of due process did not occur until the Court of Appeal of the State of California reversed the Judgment of the Superior Court" had any merit, he clearly should have raised the asserted federal question before the

Supreme Court of California in his Petition for Hearing there. He did not do so.

We respectfully submit that Petitioner has had full process of law on his claim against Sambo's and he should not be permitted to raise new issues before this Court that he waived below.

III.

PETITIONER SHOWS NO VALID FEDERAL QUESTION AND MERELY SEEKS ANOTHER REVIEW OF THE EVIDENCE.

Petitioner concedes that California law requires that an agent who enters into a contract which is required to be in writing must have written authority from his principal in order to bind the principal to the contract. Petitioner further admits that the agent in this case did not have written authority to enter into the alleged contract. His position apparently turns upon the argument that the Court of Appeal acted erroneously in failing to declare under California law that Sambo's was estopped to rely upon the lack of written authority to avoid legal responsibility. Necessarily, Petitioner asserts that the California Supreme Court also erroneously assessed the factual situation in upholding the action of the Court of Appeal.

However, nowhere in the Petition does Petitioner demonstrate any "fundamental principle" with which the California decision conflicts. It is well established law that a merely erroneous decision by a State judge is not a violation of due process of law. *Beck v. Washington*, 369 U.S. 541, 554 (1962). Although

Petitioner presents himself with the generalization that the California courts erred in sanctioning a pattern of conduct by Sambo's which Petitioner deems unjust without any citation of reasons for the lack of justice therein. Petitioner verbalizes no "fundamental principle" which has even arguably been violated, let alone "clearly violated." *American R. Export Co. v. Kentucky*, 273 U.S. 269 (1927).

IV.

THE CALIFORNIA DECISION WAS CORRECT.

Even if this Court were to indulge in simply reviewing and assessing the evidence to determine whether it agreed with the California Courts, this Court would find that the decision was correct in accordance with universally accepted legal principles. Consequently, certiorari would serve no useful purpose and the case does not involve any unusual or significant issue. In fact, the Court of Appeal ordered that the Opinion not be published in the official reports because it contained no unusual issue.

Petitioner is a licensed California real estate broker. He knew that he was dealing with another licensed real estate broker when he was dealing with Mr. Wagner. He knew, and as a real estate broker is required to know, that any authority that Mr. Wagner might have to bind Sambo's to a 25 year lease of real property was required to be in writing.

When one is dealing with an agent whose authority is, or must be, in writing he has a duty to inquire as to the existence of the writing in the scope of the agent's

authority. That is both "black letter" general law, *2A, CJS, Agency*, § 167, p. 813, and the law of California, *Ernest v. Searle*, 218 Cal. 233, 237 (1933). In fact, in California the person dealing with the agent must demand production of the writing. *Ernest v. Searle*, 218 Cal. at 237. The general rule is that a person dealing with an agent must ascertain the extent of the agent's authority and he fails to do so at his peril. *2A CJS, Agency*, § 168. The statements of the agent cannot create an estoppel; only the acts of the principal lead to the estoppel. Citations are in the Court of Appeal opinion, page 31.

In the final analysis, the California Court of Appeal was clearly correct in holding that there was nothing in the evidence to justify an estoppel of Sambo's Restaurants, Inc. to rely upon § 2309 of the California Civil Code. The decision was correct under California law and under general principles applicable throughout the States of this country.

CONCLUSION

The Petition for Certiorari in this matter should be denied.

Respectfully submitted,

HUGH J. HAFERKAMP
Cavalletto, Webster, Mullen
& McCaughey
112 E. Victoria Street
Santa Barbara, CA. 93101
(805) 966-1501

Attorneys for Respondent.